Division of Competence between Member States and the EC

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I. Introduction

The issue concerning the competence to legislate is one of the key issues of the European convention. In this context, the question is raised in general terms (how should the competence be divided? which methods shall be used for this purpose? should the current system be thoroughly modified?)[1]. However, the present paper will focus more specifically on the field of environmental policy. This appears useful for at least four reasons: firstly, the methods of division of competence between Member States and EC/EU differ in the various areas of the treaty, so as to justify limitation to one domain. Secondly, environmental matters have certain distinctive characteristics, above all an interrelational aspect and difficulties in the implementation process[2]. Thirdly, it seems rather unlikely that the convention (and/or the Member States later on) will really find a general method for the delimitation of competence, which means that the characteristics of the different areas will probably – one way or another – still play a certain role. Finally it seems useful in any case to start from the existing situation which requires a particular view of each domain of competence.

Thus, the objective of the present paper can be summed up in the following points: to analyse the current system of division of competence in Art. 174 seq. EC Treaty (II.), to illustrate these principles by applying them to the special question of the right of access to justice of environmental organisations (III.) and, in a last stage, to show that the current system of division of competence seems - in principle - to be well suited to environmental matters, even if some clarifications could be helpful (IV.).

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1 Cf. to this question for example *von Bogdandy/Bast,* Die vertikale Kompetenzordnung der EU. Rechtsdogmatischer Bestand und verfassungspolitische Reformperspektiven, EuGRZ 2001, 441 seq.; *Bungenberg,* Dynamische Integration, Art. 308 und die Forderung nach einem Kompetenzkatalog, EuR 2000, 879 seq.; *Bieber,* Abwegige und zielführende Vorschläge: zur Kompetenzabgrenzung der Europäischen Union, integration 2001, 308 seq.; *Pernice*, Kompetenzabgrenzung im europäischen Verfassungsverbund, JZ 2000, 866 seq.

2 Cf. to these particularities with further references *Jans,* European Environmental Law, second edition, 2000, 17 seq., 135 seq.; *Epiney,* Umweltrecht in der EU, 1997, 3 seq., 105 seq.; *Calliess,* in: Calliess/Ruffert (Hrsg.), Kommentar zu EU-Vertrag und EG-Vertrag, 2. Aufl., 2002, Art. 175, Rdnr. 28 seq.

II. Division of competence in environmental matters: the system of Art. 174 seq. EC Treaty

Like many provisions relative to the competence of the EC, Art. 175 EC Treaty – which is the relevant legal basis in the field of environmental policy – is based on the principle that the achievement of certain aims should be decisive in answering the question of whether or not the EC has the competence to adopt a certain legislative act. Art. 175 EC Treaty confers – to the EC – the (general) competence to adopt all measures which should help realise the objectives enumerated in Art. 174 EC Treaty. In other words: the range of the Communities' competence in environmental matters is determined by the goals formulated in Art. 174 EC Treaty.

The question which is raised by this system is whether the reference to Art. 174 EC Treaty could in any way imply a real limitation of the EC's competence. This question must be answered in the negative: the catalogue of aims set out in Art. 174 EC Treaty is very extensive. Thus, the environmental policy of the EC should contribute to preserve and protect the environment and to improve its quality, to protect human health, to use natural resources in a rational way and to promote international activities in this field. The formulation of these objectives is so broad that it is difficult to imagine a Community measure that does not fall within this catalogue. It would therefore seem that the reference to the objectives of Art. 174 EC Treaty does not really limit the Communities' competence in the field of environmental policy. It can also be added that the notion of environment in Community law is a very wide one, even if it does not comprise all the conditions which are of importance to a person's well-being: it embraces the natural environment, be it modified or not by human activities[3].

Nevertheless, the question which arises is whether the explicit indication, in Art. 174 EC Treaty, that EC policy should (only) contribute to realise the targets mentioned in this provision signifies that certain areas of competence should remain in the hands of Member States, thus implying that EC law acknowledges a sort of "domestic environmental legislation". This question must definitely be answered in the negative, for at least four reasons:

- firstly, as pointed out before, the extent of the EC's competence in the field of environmental policy is determined by the purpose of the planned measures to realise the objectives mentioned in Art. 174 EC Treaty. As a consequence, this criterion is the only one that is relevant in order to determine the limits of the Communities' competence.
- secondly, the reference to the realisation of the objectives of Art. 174 EC Treaty implies that in principle no area of policy can be excluded straight off from the

[3] Cf. with further references *Epiney,* Umweltrecht in der EU, 1997, 3 seq.

competence of the EC. In fact, a vast range of measures in numerous areas can, in principle, all contribute to the achievement of the aims mentioned in Art. 174 EC Treaty.

- thirdly, Art. 174 and 175 EC Treaty do not contain any criteria which would make it possible to define the "domestic competence" of Member States one way or another.
- fourthly, Art. 175 II EC Treaty confirms the opinion upheld in this paper: this provision mentions policies which, in principle, definitely fall within the competence of the Member States, so that this provision only makes sense if one assumes that the Community's competence cannot be limited to certain areas but, on the contrary, extends to all material domains, provided that the foreseen measure contributes to the realisation of one of the objectives set out in Art. 174 EC Treaty.

Finally, I would like to call to mind the principle of subsidiarity (Art. 5 II EC Treaty) which establishes the conditions under which an existing competence can be made use of[4]. As I am discussing the very existence of a competence, I will only evoke this principle in general terms[5].

III. Concerning the EC's competence to introduce provisions relating to access to justice, especially for environmental organisations

The purpose of the following chapter is to show that on the basis of the current system, as described above[6], the Community has the competence to introduce, in a general manner, an obligation for Member States to implement a right of access to justice in favour of certain persons, especially environmental organisations.

According to the principle that Art. 175 EC Treaty includes all measures which contribute to the realisation of the objectives mentioned in Art. 174 EC Treaty, the Community also has the competence to introduce measures tending to improve the implementation of environmental law. In other words, the scope of Art. 174 and 175 EC Treaty is not limited to material provisions but also includes instruments of procedure which could contribute to a better enforcement of environmental law and as a result to a better protection of the aims pursued. It is therefore relatively undisputed that the Community can – in a particular environmental act – include instruments aimed at improving implementation, such as provisions guaranteeing access to justice[7]. This point of view is convincing, because the various aspects of

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4 Cf. only *Jans,* European Environmental Law, second edition, 2000, 11seq.; *Epiney,* Umweltrecht in der EU, 1997, 84 seq.

5 Cf. III. in relation with the special question of an introduction of a general right to access to justice of environmental organisations.

6 II.

7 Cf. *Ludwig Krämer,* Zur innerstaatlichen Wirkung von Umwelt-Richtlinien der EWG, WiVerw 1990, 138 (156 f.); *Jane Holder/Susan Elworthy,* Annotation to Case C-237/90, CMLRev 1994, 123 (132 f.); *Wolfgang Kahl,* Umweltprinzip und Gemeinschaftsrecht, 1993, 144 seq.; *Bernhard Wegener,* Rechte des Einzelnen, 1998, 85 seq.; *Matthias Ruffert,* Subjektive Rechte im Umweltrecht der EG, 1996, 320

implementation – access to justice included - are very often vital in order to ensure the effectiveness of a legislative act. The issue is often also narrowly related to material aspects. Finally, the principle according to which the implementation of Community law generally falls within the competence of Member States, leaving them free to settle on the modalities ("autonomy concerning the implementation instruments"), is not in conflict with the opinion set out above: Member States are only autonomous inasmuch as they are not bound by Community legislation, so that the principle mentioned cannot alter the Communities' competence. No material area can be as such excluded straight off from the Communities' competence since the latter is defined –in the field of environmental policy at least, but not only –according to the realisation of specific objectives. Many provisions can be found in the environmental legislation of the EC which touch on questions of implementation, including aspects of access to justice[8]. Another aspect concerns the various provisions in environmental directives relative to questions of public participation[9].

The real question in this context is whether Art. 175 EC Treaty also allows the EC to pass legislation on issues of implementation (including access to justice) independently from a concrete legislative act. In other words: can the Community – on the basis of Article 175 EC Treaty – adopt a general directive[10] containing the obligation for Member States to introduce certain implementation measures, including among others the guarantee of a defined access to justice? There could be some doubts to their right to do so, as there would be no more link to a specific legislative act. The Community definitely has the competence to adopt such a general directive: Inasmuch as it is undisputed that the Community legislator can introduce this type of provision in each material legislative act, there is no reason to assume that he could not settle such implementation issues in a general act. As a result, a general process of settling issues of implementation does not raise any further questions – as far as the competence of the Community is concerned – than those raised by an individual introduction in each material legislative act. Furthermore, it is allowed, under Art. 175 EC Treaty, to introduce - in a general way - measures which will improve the implementation of environmental law, since a better implementation of environmental law contributes to the objectives of Art. 174 EC Treaty. These measures also include the extension of access to justice, which constitutes one of the classical instruments leading to an improved implementation[11].

The obligation of Member States to introduce instruments of implementation, especially in the field of access to justice, can also be founded in Community legislation which is not based on Art. 175 EC Treaty but on other dispositions of the Treaty. Art. 6 EC Treaty makes it clear

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seq.; *Manfred Zuleeg,* VVDStRL 53, 190 seq. Cf. in general to this question (competence of the Community to rule on aspects related to implementation) *Armin Hatje,* Die gemeinschaftsrechtliche Steuerung der Wirtschaftsverwaltung, 1998, 95 seq.

8 E.g. Art. 4 Directive 90/313, access to information on environment.

9 E.g. Art. 6 II Directive 85/337, environmental impact assessment, Art. 15 I Directive 96/61.

10 In any case a directive would be probably more suitable than a regulation.

11 See also *Ruffert,* Subjektive Rechte im Umweltrecht, 1996, 320 seq.

that environmental matters can also be pursued in other areas of policy. Therefore, the competence of the Community to introduce implementation measures must also be extended to acts in these areas. In this perspective, Art. 175 EC Treaty allows the EC to impose obligations on the Member States to take special implementation measures. This article can therefore be regarded as an independent legal basis for the decreeing of acts containing provisions the objective of which is to improve the implementation of environment-related obligations.

These considerations show that the competence of the EC to introduce a right of access to justice for environmental organisations is limited to matters which concern the implementation of Community legislation. In other words: the EC can only stipulate an obligation for Member States to introduce a right for environmental associations to invoke a violation of EC law or of national law founded on EC law (as transposed directives). Therefore, the national legislator cannot be obliged to introduce a general access to justice for environmental organisations allowing them to invoke violation of a purely national environmental legislation[12]. National environmental legislation is adopted by the national legislator on the basis of a purely national decision; therefore if the Member States can decide on the adoption of material rules, they must also have the competence to decide how they want to ensure the implementation of the national legislation and whether or not they want to introduce a right of access for certain persons, especially for environmental associations. The competence of Art. 175 EC Treaty (in relation with Art. 174 EC Treaty) refers only to Community legislation and its implementation; Art. 175 EC Treaty does not lay down any kind of general clause obliging Member States to adopt measures which will ensure a more effective implementation of environmental legislation, even a national one. Therefore, the Community's competence to adopt measures related to implementation has a subsidiary character. On the other hand, these principles do not mean that national legislation can never be the object of a Community obligation to introduce a right of access to justice for environmental associations: the right of access to justice can be justified, provided that the national legislation transposes or implements Community law, since in this case the object of the implementation is - at least indirectly - Community legislation[13].

In principle, the introduction of a right of access to justice for environmental organisations in the sense mentioned above would also satisfy the requirements of the principle of subsidiarity (Art. 5 II EC Treaty)[14]: Since the deficiency in the implementation of Community environmental law is a recurrent phenomenon, the aim of such a measure cannot be achieved

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12 The opposite view is defended by *Führ/Gerbers/Ormond/Roller,* elni Newsletter 1994, 3 (6, 8 s.).

13 The problem is parallel to the question of the conditions under which fundamental rights of the European legal order are also binding for Member States. For more details on this problem with further references, see *Epiney,* Umgekehrte Diskriminierungen, 1995, 125 seq.

14 For more details on this principle with special reference to environmental policy, see *Jans,* European Environmental Law, second edition, 2000, 11 seq., who comes to the conclusion that "an examination of Community environmental legislation in the light of the above guidelines would reveal that probably not one environmental directive or regulation would fail to pass the test." (p. 14).

– in a sufficient manner – on a national level. It is sufficient that the aim of the measure cannot be, *de facto*, efficiently realised on the level of the Member States; a real impossibility is not required. If a right to access of environmental associations is introduced, experience in different States[15] has shown that this instrument improves the implementation of environmental legislation in general so that the aim pursued can be better achieved on the level of the Community [16].

IV. Conclusion: evaluation of the current system and perspectives for the division of competence in the field of environmental policy

The current system according to which the range of the EC's competence in the field of environmental policy is defined in relation to the objectives of environmental policy, themselves defined in a broad manner, should be maintained. This system makes it possible to react to the relevant and important problems in the field of environment and to take the necessary measures in order to achieve the desired aims. Furthermore, it is a necessary condition in order to enable the Community to take all measures for a coherent environmental policy. This system also takes into account the interdependence which characterises environmental tasks: very often, the lack of measures in one area brings about important consequences for other areas so that an orientation towards the aims of environmental policy seems to be the best solution for defining the Communities' competence. This means that in the area of environment there should be no division of competence as regards narrowly and completely defined fields ("sachgegenständlich"), but there should be –in the future as well – a clear reference to the aim of environmental policy in relation with a large notion of environment. Thus, as in numerous other areas of the EC's competence, its competence in the field of environment is on the one side defined in relation to a (wide) area (environment), and on the other side determined by the effectiveness of the measure in the realisation of the aims defined in the Treaty[17].

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15 See the overview by *Epiney,* Gemeinschaftsrecht und Verbandsklage, NVwZ 1999, 485 (486); see also in relation to the situation in different Member States *Epiney/Sollberger,* Zugang zu Gerichten und gerichtliche Kontrolle im Umweltrecht. Rechtsvergleich, völker- und europarechtliche Vorgaben und Perspektiven für das deutsche Recht, 2001, 29 seq.

16 If the EC has the competence to impose an obligation for Member States to introduce an access to justice for environmental organisations, the form in which such an obligation should be introduced must be decided in a second step. This point is not included in the topic of this paper, however for more details on this subject, see *Epiney,* Gemeinschaftsrecht und Verbandsklage, NVwZ 1999, 485 (493 seq.).

17 In principle, almost all the competences in the Treaty are defined in that way. They distinguish essentially by the reference to a certain domain (environment, transport etc.) or by the lacking of such reference (as Art. 94 s. EC Treaty). So, it would be a fundamental change to alter this system in favour of a sort of enumeration of areas ("sachgegenständlich") for which the EC should be competent. Cf. in relation to the current discussion *von Bogdandy/Bast,* Die vertikale Kompetenzordnung der EU. Rechtsdogmatischer Bestand und verfassungspolitische Reformperspektiven, EuGRZ 2001, 441 seq.; *Bungenberg,* Dynamische Integration, Art. 308 und die Forderung nach einem Kompetenzkatalog, EuR 2000, 879 seq.; *Bieber,* Abwegige und zielführende Vorschläge: zur Kompetenzabgrenzung der

Above all, the maintenance of the current system would have the following consequences:

- From the perspective of the EC, there will / should be no limiting list of areas which can be the object of Community legislation.
- From the point of view of the Member States, there will / should not exist a list of "reserved domains" in which the Community can in no case take legislative measures. If the competence of the EC is defined in relation with the contribution of a measure to the realisation of aims, no substantial field can be excluded from the very beginning. In other words, the competence of the EC will / should be defined by its contribution to an aim and not by its belonging to a specific domain, so that from a material point of view no domain can be excluded straight off from EC legislation.
- Community action does not necessarily require a link to another Member State; the aims actually defined in Art. 174 can be dealt with even if there is no link to another Member State.
- Community measures relating to implementation fall within the competence of the EC. Over and above the arguments already mentioned above, it must be pointed out that the limits between material measures and measures only relating to implementation are blurred and in any case difficult to define.
- The division of competence itself should not be determined by the principle of subsidiarity. It does not seem possible to precisely define domains which – on the basis of an application of the principle of subsidiarity - should fall within the competence of the EC and others (only) within the competence of Member States. Such a system would lead to endangering the realisation of the aims of environmental policy in the EU. Furthermore, it does not seem possible to find the "right" solution as regards the division of competence, on the basis of a scientific analysis of the principle of subsidiarity.

This plea for the maintenance of the current system does not mean that there is no need at all to reform the division of competence between EU and Member States. However, in my opinion – and this affirmation is not limited to the domain of environmental policy – the need for a reform is merely an affair of clearer presentation and formulation of the system of division of competence; the substance – in particular the orientation of the EC's competence towards the realisation of aims – should not be changed. Above all, the question of the legislative procedure must be raised, especially in the field of environment policy. Therefore there is no reason (apart from the merely "selfish" interests of certain Member States) for Art. 175 II EC Treaty to reserve the procedure of unanimity for the domains mentioned in this provision and for it to not set down the procedure of codecision.

Europäischen Union, integration 2001, 308 seq.; *Pernice*, Kompetenzabgrenzung im europäischen Verfassungsverbund, JZ 2000, 866 seq.